IN THE

Supreme Court of the United States

October Term, 1976

No. 76-179

LOUIS A. MARKERT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR AMICUS CURIAE LEGIS '50 IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CASILLAS PRESS, INC.—1717 K Street, N.W.—Washington, D.C.—223-1220

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I. INTRODUCTION

Petitioner LOUIS A. MARKERT (Markert) was indicted in a federal criminal proceeding that was based, in part, on testimony he gave before a federal Grand Jury concerning his activities as a member of the legislature of the state of Illinois. At the time of his testimony, Markert was unaware of the provisions of the Illinois Speech or Debate Clause[1]

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[1] That Clause states: "Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during and returning from sessions of the General Assembly. A member shall not be held to answer before any other tribunal for any speech or debate, written or oral in either house. These immunities shall apply to committee and legislative commission proceedings." Art. 4, Sec. 12, Illinois Constitution, 1970.

and unwittingly failed to invoke the privilege provided therein. The present case arises out of his subsequent efforts to have his Grand Jury testimony barred.

The basic issues presented in this case are: whether the testimony of a state legislator concerning his activities in the legislature is privileged and must be excluded from a federal criminal proceeding; if such a privilege exists, whether it is based on federal common law or on state constitutional provisions; and, assuming its existence, whether the privilege can be waived by an individual legislator.

The record below is full of conflict. As noted in the Petition for Writ of Certiorari filed on August 7, 1976, the Federal District Court for the Northern District of Illinois, Eastern Division, held that the Illinois Constitution governed and that under its terms the evidence was inadmissable; it further held that Markert could not waive his privilege. A three-judge Court of Appeals for the Seventh Circuit reversed. It held that the Federal Rules of Evidence governed, that under the Rules, an evidentiary privilege based on federal common law existed, but that Markert had waived his privilege. Finally, the Seventh Circuit sitting en banc affirmed the three-judge court's decision but rejected its reasoning. In a decision that adopted the dissenting opinion filed by one of the members of the three-judge court, the en banc court ruled that federal common law does *not* extend an evidentiary privilege to a state legislator in a federal criminal case.

It is the position of amicus LEGIS '50 that this case presents important and novel issues of federalism that can only be resolved by this Court. Further, failure to resolve them will threaten the integrity of state legislatures in almost all of the states and could result in a dimunition of the force of state constitutions. Should the Court grant cert,

LEGIS '50 will seek permission to argue the position that the constitutional relationship between the states and the United States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution. In order that this issue be fully and properly explored amicus urges the Court to grant Markert's petition.

II. INTEREST OF AMICUS

LEGIS '50 is a nonpartisan, not-for-profit citizens' organization formed in 1965, whose primary purpose and function is to improve the operations of state legislatures so that they will more fairly and effectively represent the interests and needs of the citizens of the states. Among its activities LEGIS '50 has and continues to perform surveys and analyses of the effectiveness of individual legislatures; to recommend specific changes and modifications in regard to the proceedings of individual legislatures; and to serve as a national source of expertise to both citizens and legislators concerned with reforming their state's legislature.

LEGIS '50's interest in the issues raised in this case is twofold: its goal of achieving more effective state legislatures can only be achieved if the integrity of the legislature is preserved by preventing incursions on the activities of state legislators when performing their legislative functions by other branches and other levels of government. Secondly, LEGIS '50's work in building strong legislatures requires that state constitutional provisions defining the powers and operations of the legislatures be given their full weight and authority by the federal courts. Through its intervention in this suit, LEGIS '50 hopes that it will be able to shed new light on these issues, informed by its practical knowledge of the day-to-day operations of the legislatures.

III. LEGAL ARGUMENT

A. The Decision of the Seventh Circuit Raises Important and Novel Issues of Federalism that Challenge the Integrity of State Constitutions.

By its refusal to give full force and effect to the Speech or Debate Clause of the Illinois Constitution, the Seventh Circuit has established a precedent that could effect almost all of the states. All but two of the states have clauses in their constitutions providing similar protection for their legislators, clauses that are now subject to the same interpretation. More importantly, if the Court of Appeals decision is allowed to stand, it will provide precedent for further encroachments on other state constitutional provisions. The Court of Appeals has held that a state constitutional provision that is not only in harmony with the federal constitution but is perfectly parallel to a provision contained therein, and whose purpose and ramifications go far beyond evidentiary procedure, has been preempted by a federal procedural rule providing in general terms for application of the federal common law of privilege in federal criminal proceedings. This holding represents a serious erosion of the principle that state constitutional provisions are valid unless clearly prohibited by the federal Constitution or *specifically* preempted by valid federal legislation. The erosion of that principle will permit wholesale disregard for state constitutional provisions that pose even a minor inconvenience to the administration of federal laws or of federal justice.

This is not merely a theoretical danger. In *Barrera v. Wheeler*, 475 F2d 1338 (8th Cir. 1973) the Eight Circuit gave a similarly cavalier treatment to a state constitution. It held that federal funds channeled through the states under the Elementary and Secondary Education Act of 1965 were not subject to a Missouri constitutional provision limiting

education expenditures to public schools, despite a clearly evidenced Congressional intent to accommodate state law in the administration of those funds. This Court reversed *Wheeler v. Barrera*, 417 U.S. 402 (1973). The *Barrera* case and the present case show that the lower federal courts are strongly inclined to subordinate state law when its application would have any impact at all on the administration of federal law. This Court should articulate standards for determining when such subordination is justified.

The *Markert* case raises issues as central to the definition of the proper roles of our various levels of government as those which were raised in *National League of Cities v. Usery*, 96, S.Ct. 2465 (1976), decided last term. There, this Court held that the Tenth Amendment constituted an affirmative limitation on the exercise by the federal government of even those powers explicitly conferred on it by the federal Constitution. The limits were drawn to preserve "the States' freedom to structure integral operation in areas of traditional government functions." *National League of Cities, supra*, at p. 2475. The area of state government directly affected by the curtailment of the Speech or Debate Clause privilege, the area of a legislator's activity on the floor of the state legislature, is preeminently a state domain. Further, the federal intervention supported by the Seventh Circuit is based not on authority explicitly conferred by the U.S. Constitution, but on powers derived by implication.

Even before *National League of Cities*, the federal courts were often careful in criminal and civil federal question cases to identify any countervailing state interests before mechanically applying the federal common law of privilege. See *Garner v. Wolfinbarger*, 430 F2d 1093 (5th Cir. 1970); *Baird v. Koerner*, 279 F2d 623 (9th Cir. 1960); *Boyd v. Gullet*, 64 FRD 169 (D. Md. 1974) (which takes note of

Proposed Rule 501). In these cases the courts adopted a balancing approach: where the state policy interest was significantly stronger than the federal, state evidentiary rules were applied. *Baird v. Koerner, supra.* However, the results of such balancing were not consistent or uniform. And that approach is now outdated. This Court's holding in *National League of Cities* requires that the balancing approach be replaced by an approach that guarantees absolute protection to state constitutional provisions relating to core state activities.

In summary, it is clear that the *Markert* case presents important and novel issues of federalism. Where important questions concerning the relationship between branches of federal and state governments depend for their resolution on the construction of a federal statute, this Court has frequently granted certiorari to render a definitive construction. See *Leiter Minerals v. U.S.*, 352 U.S. 220 (1957). Where, as here, the issues presented are questions of first impression involving the construction of federal statutes, the Court has traditionally given them priority consideration. See *American Federation of Musicians v. Wittstein*, 379 U.S. 171 (1964).

The constitutional and statutory question raised by this case is an important one: What consideration is due by a federal court to state constitutional provisions which have incidental effects on the operation of federal court procedures? The Court has never previously addressed this issue. In *Tenney v. Brandhove*, 341 U.S. 367, it held that the "official privilege" available at common law protected a state legislator from inquiry into his legislative activities. But it has never considered whether that common law doctrine need be reached where a state constitution has clearly articulated the privilege. That issue is clearly presented to the Court by the Petitioner and should be addressed.

B. The Decision of the Seventh Circuit Raises Important Issues Concerning the Federal Administration of the Criminal Law.

1. This cases raises an important issue concerning federal criminal procedure: whether a state constitutional provision or the federal common law defines evidentiary privilege. The history of the case in the courts below has clouded that issue. The District Court assumed without argument that the Illinois Speech or Debate privilege applied in the federal criminal proceeding. This assumption was rejected by the three-judge Court of Appeals and by the court sitting en banc; however each of the latter reached different and conflicting interpretations of the law. In the final decision, the Chief Judge for the circuit took the same position as had the District Court. This tortured course indicates that the dominance of federal common law over state constitutional privileges is not nearly as self-evident as the Seventh Circuit suggests.

This conflict makes it imperative for this Court to clarify the scope of Rule 501 and particularly the extent to which it contravenes the highest expression of state policy. *Calhoon v. Harvey*, 379 U.S. 134. The U.S. Supreme Court bears the ultimate responsibility for the fair and uniform application of procedural rules throughout the federal court system, and has a special responsibility to insure the fair and uniform administration of criminal justice. In *Marshall v. U.S.*, 360 U.S. 310, 313 (1959) the Court granted cert in order to ". . . exercise . . . our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts." In *McNabb v. U.S.*, 318 U.S. 332 (1943) the Court noted that ". . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions."[2] Where those

[2] Although *McNabb* was decided before the statutory certification of the common law rules of evidence, its motivation is still valid.

rules are unclear or incorrectly interpreted, as here, it is particularly appropriate for the Supreme Court to render a statement on the matter.

2. This case may also raise a question of waiver of an evidentiary privilege, an issue central to the fair administration of the criminal law. Should this Court hold that the Speech or Debate privilege extends to this Petitioner it will be called upon to resolve an issue of comparable importance: Is the Speech or Debate privilege set out in the federal and state constitutions an absolute proscription or a personal privilege which may be waived, and, if it is personal, may it unknowingly be waived?

This Court, has repeatedly recognized the threat to Constitutional rights posed by too liberal a construction of the waiver doctrine; it has agreed to hear a large number of cases involving alleged waiver of privilege under a great variety of circumstances. Throughout its consideration of those cases, it has evolved a coherent set of rules governing waiver of the privilege against self-incrimination. See *Johnston v. Zerbst*, 304 U.S. 458 (1938); *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court has also heard cases involving the privilege imbedded in the Speech or Debate Clause, *U.S. v. Johnson*, 383 U.S. 169 (1963); *Gravel v. U.S.*, 408 U.S. 622 n.13 (1971), but it has never specifically addressed the issue of waiver by a legislator of his own privilege.

Amicus curiae submits that particularly in view of the conflict in the decisions rendered below in this case, the issue is ripe for consideration. Although the Speech or Debate privilege is invoked less frequently than is the Fifth Amendment privilege, it is of similar importance in the American judicial system. The requirements for waiving it should be clearly articulated.

C. Petitioner Markert Has Not Waived His Speech or Debate Privilege.

It has been suggested that the Court should not grant cert in this case because the issue concerning the existence of an evidentiary privilege running to a state legislator in a federal criminal trial is an academic one; if Markert had such a privilege he waived it. The District Court disagreed with this position and so does this amicus. Amicus contends that there is compelling precedent for holding that Markert could not waive his privilege even had he intended to do so.

In *U.S. v. Johnson*, 383 U.S. 169 (1966), this Court reviewed the conviction under a federal conflict of interest statute of a U.S. Congressman found to have conspired to make a speech for compensation on the floor of the House of Representatives. The Court held that "a prosecution under a general criminal statute dependent on such inquiry (into the motives underlying a speech on the floor of Congress) necessarily contravenes the Speech or Debate Clause." *Johnson, supra* at 173.

The Court never explicitly addressed the issue of waiver, but since its holding constitutes a general proscription of criminal prosecution based on evidence obtained in contravention of the Speech or Debate Clause, it follows that the only way the privilege could possibly be waived would be as a practical matter through failure to raise it at *any* stage of the proceedings.

Further, the Court of Appeals opinion affirmed by the Supreme Court in *Johnson* indicates that the Court considered itself deprived by the Speech or Debate Clause of jurisdiction to try Johnson, *U.S. v. Johnson*, 337 F2d 180, 186 (4th Cir. 1964). A court without jurisdiction has no power to try a defendant, no matter what he does or fails to do procedurally; lack of subject matter jurisdiction cannot

be waived at any stage of the proceedings. The Court of Appeals cites a number of other decisions holding similar evidence "absolutely privileged" and emphasizing that "the privilege belongs to Congress and was developed for the benefit of Congress as a whole." *Johnson, supra* at 190.

Since the Illinois Speech or Debate Clause is substantially identical to the federal clause construed in *Johnson*, it is reasonable to assume that its scope was intended to be equally broad. If a federal court is bound to honor the Illinois Speech or Debate privilege at all it must give it as liberal a construction as it would the federal privilege and must find that it has not been waived and cannot be waived by the petitioner in this case.

CONCLUSION

LEGIS '50 respectfully submits that the question of whether state legislators possess an evidentiary privilege protecting statements made in or relating to the performance of their legislative duties from introduction in federal criminal proceedings is of central importance to the operation of the fifty state legislatures. Of equal importance is the question of the weight to be accorded a state constitutional provision that conflicts with a reading of federal common law. It is the position of this amicus that, contrary to the decision reached by the Seventh Circuit, an evidentiary privilege does exist that is based on the state constitution and that privilege cannot be waived by an individual legislator. Because of the importance and novelty of the questions presented, the Court should act to remove the ambiguity created by the decisions below and should further delineate the protection accorded by the Tenth Amendment to the states when performing an integral state function.

Under the doctrine set forth in *NLC v. Usery* this Court should acknowledge that the activities of the state legislature are among the most basic and central of all state functions and that a state constitutional provision pertaining to them is of greater weight than federal common law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1976, three copies of this Brief for Amicus Curiae LEGIS '50 in Support of Petition for Writ of Certiorari were mailed, with adequate first class postage prepaid, to Solicitor General Robert Bork, Department of Justice, Washington, D.C. 20530; and to Anna R. Lavin and Edward J. Calihan, Jr., attorneys for Petitioner, at their law offices located at 53 West Jackson Boulevard, Chicago, Illinois 60604.

I further certify that all parties required to be served have been served.

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